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17 UNITED STATES OF AMERICA

18 UNITED STATES OF AMERICA,

19 CR No. 15-131(A)-JFW

20 Plaintiff,

21 v.
22 GOVERNMENT'S OPPOSITION TO
23 DEFENDANT'S MOTION TO
24 DISMISS COUNTS TWO AND FIVE
25 OF THE FIRST SUPERSEDING
26 INDICTMENT

27 TEOFIL BRANK,
28 aka "Jarec Wentworth,"
aka "@JarecWentworth,"

29 Defendant.
30
31 Hearing Date: June 26, 2015
32 Hearing Time: 9:00 a.m.
33 Location: Courtroom of the
Hon. John F. Walter

34
35 Plaintiff United States of America, by and through its counsel
36 of record, the United States Attorney for the Central District of
37 California and Assistant United States Attorneys Kimberly D. Jaimez
38 and Eddie A. Jauregui, hereby files its opposition to Defendant's
39 Motion to Dismiss Counts Two and Five of the First Superseding
40 Indictment (Dkt. 195).
41
42

This Opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: June 25, 2015

Respectfully submitted,

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/s/
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

20 First, the indictment is sufficient under Rule 7(c) of the Rules
21 of Criminal Procedure because Counts Two and Five fairly inform
22 defendant of the charges against him, track the statutory language,
23 and contain all of the known elements of the Hobbs Act as articulated
24 in the Ninth Circuit Jury Instructions No. 8.142A, which address
25 Hobbs Act extortion by nonviolent threat. What's more, the Ninth
26 Circuit Jury Instructions themselves provide that threat of economic
27 harm is not the only type of non-violent threat that can predicate a
28 Hobbs Act violation.

1 Second, the Hobbs Act, by its plain statutory language, pertains
2 to extortion based on the "wrongful use" of "fear" to obtain property
3 and leaves open the cause of fear so that it could include fear
4 prompted by threats of reputational harm, threats of economic harm,
5 or any combination of these. 18 U.S.C. § 1951(b)(2). Indeed, the
6 traditional definition and understanding of extortion includes
7 threats to one's reputation in the community, and particularly
8 threats to expose embarrassing sexual indiscretions. Defendant's
9 claims that his activity should only be considered "extortion" under
10 18 U.S.C. § 875(d) but not under the Hobbs Act is a fictional
11 interpretation. If defendant's conduct is extortion under § 875(d),
12 then it is also extortion under Hobbs Act because the predecessor
13 statutes of each were considered by the same Congress and
14 "extortion" means the same thing in each statute.

15 Third, the Court of Appeals for the Ninth Circuit has already
16 upheld a conviction under the Hobbs Act in circumstances similar to
17 this case wherein a defendant threatened to disclose "embarrassing"
18 information about an extramarital affair to a victim's employer.
19 United States v. Pascucci, 943 F.2d 1032, 1033-34, 1036-37 (9th Cir.
20 1991). Defendant's attempts to distinguish this controlling case are
21 disingenuous. The "wrongful use of fear" in Pascucci related to the
22 threatened disclosure of "embarrassing" material. The Pascucci court
23 did not discuss threatened economic harm or job loss as an element of
24 the threat. Here, the Victim's reputation was threatened: this is
25 sufficient to meet the statutory test under the Hobbs Act. While
26 that threatened reputational harm also encompassed economic harm (as
27 it would have affected the Victim's business reputation as well),
28 economic harm specifically is not a requirement under the Hobbs Act.

1 For all the foregoing reasons, the motion should be denied and
2 the jury should be permitted to consider Counts Two and Five.

3 **II. STATEMENT OF FACTS**

4 On or about March 3, 2015, the Victim of the extortion scheme
5 met with the FBI to report defendant's previous and continued
6 extortion attempts threatening Victim's reputation via text message
7 communications. Specifically, the Victim explained to the FBI that
8 defendant was threatening to expose the "pay-for-sex" arrangement
9 between defendant and Victim on defendant's Twitter account. The
10 Victim had extracted the text messages from his phone and provided
11 them to the FBI. Some of the relevant text messages sent from
12 defendant's phone to Victim's phone included the following:

- 13 - "Be wise on How you reply. I can bring your house down
14 [Victim]"
- 15 - "I do have a twitter and your photos. Lies can be made or
16 Maybe it's the truth"
- 17 - "Check my twitter, the conversation will grown [sic] and
18 questions will be asked. You lied to me and treated me like
19 Shit. I asked again and you put it behind you. Now it's
20 biting your ass"
- 21 - "I can't get friendship anymore, because who will want to
22 be friends with black mail . . . Money won't wash away What
23 people will read and see of you. Wow I guess I hold the
24 cards right now"

25 On May 1, 2015, defendant was charged in a seven-count first
26 superseding indictment ("FSI") with transmitting threatening
27 communications with intent to extort, in violation of 18 U.S.C.
28 § 875(d); extortion and attempted extortion affecting interstate

1 commerce, in violation of 18 U.S.C. § 1951(a); receiving proceeds of
2 extortion, in violation of 18 U.S.C. § 880; use of an interstate
3 facility to facilitate an unlawful activity, in violation of 18
4 U.S.C. § 1952(a)(3); and possession of a firearm in furtherance of a
5 crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

6 **Count One.** Count One of the FSI included the count from the
7 initial indictment in this case, which initially only charged 18
8 U.S.C. 875(d) (Transmitting Threatening Communications with Intent to
9 Extort). Count One in the FSI alleges reputational harm.
10 Specifically, Count One alleges that defendant transmitted in
11 interstate commerce a threat to injure the reputation of the Victim
12 "with the intent to extort money" when defendant "threatened to
13 distribute sensitive information about victim D.B. on social media,
14 if victim D.B. refused to transfer money." (Dkt. 93, pp. 1-2).

15 **Count Two.** Count Two of the FSI charges defendant with
16 extortion in violation of the Hobbs Act. It alleges that on or about
17 February 17, 2015, defendant "knowingly and with the intent to obtain
18 property, obstructed, delayed, and affected commerce and the movement
19 of articles and commodities in commerce, by extortion." (Id. at,
20 p.3). The Count specifically references the Hobbs Act for the
21 applicable definition of "extortion." Count Two further alleges that
22 defendant obtained at least \$500,000 from the Victim, with consent,
23 induced by the "wrongful use of fear." (Id.) The Count specifies
24 that the "wrongful use of fear" in this matter was defendant's threat
25 "to distribute sensitive information about victim D.B. on social
26 media" if the Victim refused to transfer money and other property to
27 defendant.

1 **Count Five.** Similarly, Count Five is a new count that alleges a
2 Hobbs Act violation, but for attempted extortion. (Id., p.6). Count
3 Five alleges that defendant "attempted to obstruct, delay, and affect
4 commerce and the movement of articles and commodities in commerce by
5 extortion" in that defendant attempted to obtain at least \$1,000,000
6 from the Victim, with the Victim's consent, induced by the "wrongful
7 use" of fear. (Id.) The Count specifies that the "wrongful use fear"
8 was again the threat "to distribute sensitive information about
9 victim D.B. on social media" if the Victim failed to comply. (Id.)

10 On June 19, 2015, defendant filed the Motion to Dismiss Counts
11 Two and Five (Dkt. 195) ("motion" or "Mot.") claiming that Counts Two
12 and Five are not cognizable offenses under the Hobbs Act. (Mot., 2.)

13 **III. ARGUMENT**

14 Defendant contends that Counts Two and Five should be dismissed
15 because "[t]here is no allegation in these two counts that
16 [defendant] wrongfully used fear by threatening violence against a
17 person or property, or that he used fear by threatening economic
18 harm." (Id.) Defendant's claim is meritless as it not only misstates
19 the law, but it also adds unnecessary elements into the Hobbs Act
20 charges. Neither the statute, the Ninth Circuit Jury Instructions,
21 nor any case requires economic harm as element to extortion under the
22 Hobbs Act. The FSI contains properly and sufficiently alleged
23 charges.

24 **A. Legal Standard for Dismissal of an Indictment**

25 The Sixth Amendment guarantees a criminal defendant the
26 fundamental right to be informed of the "nature and cause of the
27 charges made against him so as to permit adequate preparation of a
28 defense." See U.S. Const. Amend. VI; Gautt v. Lewis, 489 F.3d 993,

1 1002 (9th Cir. 2007). An indictment is deemed sufficient if it
2 (1) contains the elements of the offense charged; (2) fairly informs
3 a defendant of the charge against which he must defend; and
4 (3) enables him to plead an acquittal or conviction as a bar to
5 future prosecutions for the same conduct. United States v. Chenaur,
6 552 F.2d 294, 301 (9th Cir. 1977) (citing Hamling v. United States,
7 418 U.S. 87, 117 (1974)). Generally, an indictment that tracks the
8 statutory language suffices, and survives a motion to dismiss as long
9 as "those words of themselves fully, directly, and expressly, without
10 any uncertainty or ambiguity, set forth all the elements necessary to
11 constitute the offense intended to be punished." Id.; see also Fed.
12 R. Crim. P. 7(c) (requiring that indictment be "a plain, concise and
13 definite written statement of the essential facts constituting the
14 offense charged"); United States v. Rodriguez, 360 F.3d 949, 958 (9th
15 Cir. 2004) (holding that the statutory language "may be used in the
16 general description of the offense" if accompanied by a statement of
17 facts that informs defendant of "specific offense with which he is
18 charged.").

19 Counts Two and Five are sufficient because they comply with Rule
20 7(c) and meet the standards noted above by tracking the statutory
21 language.

22 **B. Extortion by Non-Violent Threat Does Include Threats to
Reputation**

23 Here, the statutory language of the Hobbs Act, in relevant part,
24 prohibits extortion generally in stating:

25 "Whoever in any way or degree obstructs, delays, or affects
26 commerce or the movement of any article or commodity in
27 commerce, by robbery or extortion or attempts or conspires
so to do . . . shall be fined under this title or
imprisoned not more than twenty years, or both.
28

1 18 U.S.C. § 1951(a).

2 The Hobbs Act defines "extortion" in subsection (b)(2) as the
3 "obtaining of property from another, with his consent, induced by
4 wrongful use of actual or threatened force, violence, fear, or under
5 color of official right." 18 U.S.C. § 1951(b)(2). The statute does
6 not limit how courts should interpret "fear." See United States v.
7 Abelis, 146 F.3d 73, 83 (2d Cir. 1998) (holding that presence of
8 infamous individual in negotiations could be cause of fear because
9 "statute does not limit the definition of extortion . . . but instead
10 leaves open the cause of fear"); United States v. Middlemiss, 217
11 F.3d 112, 118 (2d Cir. 2000) (holding that Hobbs Act does not define
12 required cause of victim's fear).

13 The purpose of statutory interpretation "is to discern the
14 intent of Congress in enacting a particular statute." United States
15 v. Shill, 740 F.3d 1347, 1351 (9th Cir. 2014). "[A]nalysis must
16 begin with the language of the statute itself; when the statute is
17 clear, 'judicial inquiry into [its] meaning, in all but the most
18 extraordinary circumstance, is finished.'" United States v. Carter,
19 421 F.3d 909, 911 (9th Cir. 2005). Unless otherwise defined, "words
20 will be interpreted as taking their ordinary, contemporary, common
21 meaning." Id. (quoting Perrin v. United States, 444 U.S. 37, 42
22 (1979)).

23 1. The Statutory Language Encompasses Threats to
24 Reputation

25 The type of extortion alleged in Counts Two and Five exemplifies
26 the traditional type of extortion lawmakers have criminalized for
27 years, which includes extortion by non-violent threats beyond mere
28 threat of economic harm. The Supreme Court has instructed courts to

1 accept the "traditional understanding" of a term in the absence of
2 contrary direction from Congress:

3 [W]here Congress borrows terms of art in which are
4 accumulated the legal tradition and meaning of centuries of
5 practice, it presumably knows and adopts the cluster of
6 ideas that were attached to each borrowed word in the body
7 of learning from which it was taken and the meaning its use
will convey to the judicial mind unless otherwise
instructed. In such case, absence of contrary direction may
be taken as satisfaction with widely accepted definitions,
not as a departure from them.

8 Morissette v. United States, 342 U.S. 246, 263 (1952). Courts
9 examining the legislative history from the Hobbs Act have noted that
10 the extortion definition in Hobbs Act reflects the generally accepted
11 of generic definition of extortion that existed at the time of
12 enactment. United States v. Jackson, 180 F.3d 55 (1999). Courts and
13 commentators alike have noted that the Hobbs Act and its predecessor,
14 the Anti-Racketeering Act of 1934, 18 U.S.C. §§ 420a-420e, were
15 modeled after New York law regarding extortion. Id.; United States
16 v. Cortes, 757 F.3d 850, 865 (9th Cir. 2014) ("Congress modeled the
17 Hobbs Act after the New York Penal Code"); James Lindgren,
18 The Elusive Distinction Between Bribery and Extortion: From the
19 Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 834 (1988)
20 (hereinafter, "Bribery & Extortion.") Importantly, the New York
21 Penal Code of 1881 explained that "fear, such as will constitute
22 extortion, may be induced by a threat to accuse . . . of any crime .
23 . . or to expose any secret" Bribery & Extortion, at 834; see
24 N.Y. Penal Code, § 553 (1881). Thus, to the extent the Hobbs Act was
25 based on New York law, the New York law interpreting "fear" should
26 inform this Court's analysis in the Hobbs Act context. Clearly,

1 threats to accuse a victim of a crime or expose a secret fall within
2 the concept of extortion-related-fear.¹

3 Congress intended extortion to mean the same thing in
4 18 U.S.C. § 875 as it does in the Hobbs Act, and § 875(d) clearly
5 encompasses threats to reputation. See Jackson, 180 F.3d at 70
6 ("Given Congress's contemporaneous consideration of the predecessors
7 of § 875(d) and the Hobbs Act, both of which focused on extortion, we
8 infer that Congress's concept of extortion was the same with respect
9 to both statutes."). As such, the Supreme Court has expressly
10 rejected narrow readings of the term "extortion" and has embraced
11 expansive views encompassing extortion based on threats to expose
12 embarrassing information of a sexual nature that could harm
13 reputation. See United States v. Nardello, 393 U.S. 286 (1969) (in
14 considering the Travel Act, holding that threats to expose alleged
15 "homosexual" conduct unless victims paid for "silence" generally
16 qualified as extortionate activity as the term is commonly
17 understood).²

18 Notwithstanding the above, defendant has argued that this Court
19 should constrain "wrongful use of fear" in Hobbs Act extortion to
20 threats of physical harm or economic harm without citing any
21 authority. (Mot., 2.) Defendant's argument should be rejected because
22 it misreads the plain statutory language. "Extortion" traditionally
23 encompasses threats of reputational harm. With this history, the
24 Court can easily interpret Hobbs Act extortion and its reference to

25
26 ¹ Notably, like New York law, California Penal Code § 519 also
27 considers threats to expose a secret as a form of extortion when used
to induce a victim to part with property.

27 ² Nardello considered the Hobbs Act definition of extortion in
28 its reasoning. Id. 393 U.S. at 290.

1 fear as expansively as the plain language allows and case law
2 traditionally supports.³

3 In the instant matter, Counts Two and Five track the statute
4 almost exactly. Counts Two and Five note that the interstate nexus
5 language and the fact that defendant obtained, and attempted to
6 obtain, property with the Victim's "consent, induced by wrongful use
7 of fear." The Counts state that defendant acted with intent to obtain
8 the property in question. Also, each Count provides a brief
9 statement of facts to put defendant on notice of the relevant offense
10 conduct by specifying the how defendant wrongfully used fear, i.e.,
11 "by threatening to distribute sensitive information about victim D.B.
12 on social media, if victim D.B. refused to transfer money, a
13 motorcycle, and the title to victim D.B.'s automobile." This
14 language tracks the statute and covers the elements.

15 2. The Elements Pursuant to Criminal Jury Instruction
16 No. 8.142A Allow For Reputational Harm

17 As charged, Counts Two and Five are also consistent with the
18 recognized elements of extortion. The "elements" of the charged
19 Hobbs Act violations, as provided in the Ninth Circuit Jury
20 instructions for extortion by non-violent threat, are as follows: (1)
21 defendant induced, or intended to induce, victim to part with
22 property by wrongful threat of economic harm or some specified other
23 nonviolent harm; (2) defendant acted with the intent to obtain
24 property; (3) commerce from one state to another was, or would have

25 ³ An unnatural narrowing of the terms "extortion" and "fear" is
26 not supported by the so-called "rule of lenity." The rule of lenity
27 does not apply because the Hobbs Act statute is not ambiguous, but
28 clearly states that wrongful use of fear to obtain property is
generally extortion, and unlawful. The fact that reputational harm
may not be commonly charged in the context of the Hobbs Act does not
make the statute itself ambiguous.

1 been affected in some way; and (4) defendant did something that was a
2 substantial step toward committing the crime (applicable to attempted
3 extortion only). See Ninth Circuit Model Criminal Jury Instruction
4 No. 8.142A (2010 ed.) (emphasis added).

5 Notably, neither the statutory language nor the elements listed
6 above require that extortion by non-violent threat be induced through
7 only threats of economic harm. To the contrary, the Ninth Circuit
8 Jury Instruction requires any other "non-violent" harm used for
9 extortion beyond "economic harm" to be specifically described. See
10 Ninth Circuit Jury Instruction No. 8.142A. Defendant has alleged
11 this false requirement that Hobbs Act extortion, based on non-violent
12 threat, can only relate to threats of economic harm. The statute
13 does not support this argument, and the Ninth Circuit jury
14 instructions actually refute the argument.

15 Defendant has failed to cite any case indicating that
16 reputational harm somehow fails as a specific non-violent harm within
17 the meaning of the Hobbs Act or the Ninth Circuit Jury Instructions.
18 Defendant has not alleged that the Counts fail to inform him of the
19 charges or prevent him from creating a defense.

20 Thus, Counts Two and Five comply with Rule 7(c) and should be
21 deemed sufficient under the Supreme Court's test for evaluating
22 challenged indictments. Hamling, 418 U.S. at 117.

23 **C. Case Law Supports Hobbs Act Counts In Ninth Circuit &
24 Elsewhere**

25 Finally, and most importantly, case law in the Ninth Circuit and
26 elsewhere supports charging a Hobbs Act violation when extortion is
27 based on threats to disclose embarrassing information. In United
28 States v. Pascucci, the Ninth Circuit affirmed a conviction of a

1 defendant under 18 U.S.C. §§ 875(d) and the Hobbs Act for
2 reputational extortion threats on similar facts as these. 943 F.2d
3 1032, 1035-36 (9th Cir. 1991). In Pascucci, the defendant threatened
4 to disclose evidence of an extramarital affair to the victim's wife
5 and employer if the victim did not pay defendant several thousand
6 dollars. Id. at 1035-36. As is the case here, the threat to the
7 victim's reputation via disclosure of a sexual secret formed the
8 basis of the extortion charges in Pascucci. Id. In upholding the
9 Hobbs Act convictions, the Court said nothing of threatened "economic
10 harm," but instead characterized the case as involving a "credible
11 threat to deliver embarrassing materials" to the victim's employer,
12 Ford Motor Company. Id. While Pascucci discussed the victim's
13 employer in the decision it was only done in the context of
14 considering the weight of interstate nexus because the employer was
15 involved in interstate commerce. Id. Nowhere in the Pascucci case
16 does it say that defendant threatened to get the victim fired by
17 exposing this embarrassing information. And nowhere in the opinion
18 does it mention that the Ford Motor Company had ever fired anyone for
19 an extramarital affair. Id. at 1040. While damage to one's
20 reputation can always lead to economic harm, that was not the basis
21 for the Pascucci decision. Defendant mischaracterizes Pascucci in
22 claiming that it relates only to threatened economic harm.
23 Reputational harm was at issue in Pascucci, which is why defendant
24 was convicted under both §§ 875(d) and the Hobbs Act, which are
25 similarly charged in the case. In Pascucci, the threat was to reveal
26 embarrassing information just as defendant here threatened to do.
27 The Victim here faced economic repercussions (just as the Pascucci
28 victim did), but that was not form of the actual threat.

1 United States v. Jackson is another case involving threats to
2 reputational harm and a Hobbs Act violation. In Jackson, the Second
3 Circuit found that evidence would have supported a Hobbs Act
4 violation where defendant threatened to disclose Bill Cosby's sexual
5 indiscretion of having a child out of wedlock to a tabloid newspaper.
6 Such a threat, while certainly loaded with potential for economic
7 harm, focused primarily on ruining Cosby's reputation as a father
8 figure on television. The threat again fixated on exposing an
9 embarrassing secret, not on causing financial ruin (although critical
10 reputational harm can always result in financial harm).

11 In this case, defendant instilled fear by threatening to expose
12 a secret about Victim on social media, which defendant said would
13 "bring [Victim's] house down." The fear leveraged a threat of
14 reputational harm, which would have impacted both Victim's personal
15 reputation and his business reputation. The harm to Victim's
16 business reputation could have certainly resulted in economic harm in
17 addition to harming Victim's emotional well-being. Such threatened
18 harm equated to the wrongful use of fear within the meaning of the
19 Hobbs Act.⁴

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⁴ In ruling on a pre-trial motion to dismiss an indictment for failure to state an offense, the district court is bound by the four corners of the indictment. See United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996). However, if the Court would like to consider proof of the business reputation harm and specific economic harm anticipated by Victim, the government is prepared to submit an offer of proof regarding these details. Such an offer of proof, however, should be unnecessary in light of the sufficiency of the Counts and case law interpreting extortion and fear. Whether the facts ultimately prove such charges is a question for the fact-finder.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the government respectfully requests
3 that this Court deny the motion and allow the jury to consider
4 whether the evidence supports Counts Two and Five.

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